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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY MCCLENDON,
Respondent.

On Writ of Certiorari to the Supreme Court of Texas

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Section 514 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144, preempts a state common law wrongful discharge suit in which the plaintiff claims that his employer discharged him to prevent the vesting of his pension rights.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and organizations throughout the United States; they have a compelling interest in legal issues that affect state and local governments.

This case concerns petitioner's contention that Section 514(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), supersedes a state wrong-

ful discharge action in a case where the plaintiff alleges that the defendant terminated his employment to preclude the vesting of his pension benefits. This contention has substantial importance for the States. If accepted, it would make dramatic inroads into the States' authority to shape their own tort law. It also would preclude state courts from implementing what they regard as important public policies in an area of traditional state concern. *Amici* therefore submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, is a comprehensive statute "enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans.'" *Firestone Tire and Rubber Co. v. Bruch*, 109 S.Ct. 948, 955 (1989), quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). To accomplish this, the statute regulates both welfare benefit plans (those that offer health, disability, vacation, and similar benefits) and pension benefit plans. See 29 U.S.C. § 1003(a). Certain of these plans, however—those maintained by the federal, state, and local governments, specified church plans, plans maintained to comply with worker's compensation and similar laws, and some others—are not covered by ERISA. 29 U.S.C. § 1003(b).

Plans that are within the reach of the statute (so-called "ERISA plans") are subject to fiduciary, reporting, and disclosure requirements. See 29 U.S.C. §§ 1021-1031, 1101-1114. ERISA also imposes substantive requirements on pension benefit plans in the areas of funding, vesting, participation, and plan termination. 29 U.S.C. §§ 1052-1086, 1301-1461. See generally *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 374-375 (1980). In addition, Section 510 of ERISA, 29 U.S.C. § 1140, makes it unlawful for "any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary * * * for the purpose of interfering with the attainment of any right to which such participant may become entitled under [a benefit] plan."

[1] Both parties' letters of consent pursuant to Rule 37 of the Rules of this Court have been filed with the Clerk of the Court.

Section 502 of ERISA, 29 U.S.C. § 1132, contains the statute's enforcement provisions. In relevant part, Section 502(a)(1)(B) authorizes any plan participant or beneficiary to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." Section 502(a)(3) also authorizes any plan participant, beneficiary, or fiduciary to seek "to enjoin any act or practice which violates the provisions of this subchapter or the terms of the plan," or to "obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." Section 502(e)(1) gives state courts concurrent jurisdiction with the federal district courts to entertain "actions under subsection (a)(1)(B)" of Section 502; the federal courts have exclusive jurisdiction to entertain other "civil actions under this subchapter brought by the Secretary [of Labor] or by a [plan] participant, beneficiary, or fiduciary."

Finally, and most importantly for present purposes, ERISA contains an express preemption provision. Section 514(a), 29 U.S.C. § 1144(a), provides that the federal statute "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of [title 29] and not exempt under section 1003(b) of [title 29]." These terms are defined by Section 514(c), which provides that the phrase "State law" includes all laws "of any State"; the term "State" in turn is defined as any

State or political subdivision "which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." In addition, Section 514(b) contains a number of exceptions to the preemption provision that are not at issue here.

2. This is a wrongful discharge action brought in Texas state court by respondent against petitioner, his former employer. Respondent's employment was terminated "after he had accumulated nine years and eight months of service" to petitioner (Pet. App. 2a); according to the court below, "the termination occurred exactly four months prior to the vesting of [respondent's] retirement and pension benefits, at which time [petitioner] would have been required to contribute to [respondent's] pension fund." *Ibid.* Although petitioner "ultimately allowed [respondent's] pension to vest" (*id.* at 2a n.2), respondent contended that petitioner had discharged him "to escape its obligation to contribute to his pension fund." *Id.* at 2a (footnote omitted). Respondent's suit was dismissed by the state trial court (*id.* at 25a-26a) and the state court of appeals (*id.* at 17a-24a) on state law grounds.

The Texas Supreme Court reversed. Pet. App. 1a-16a. While noting that Texas courts traditionally have permitted the termination of at-will employment without cause (*id.* at 3a), the court also recognized that both federal and state law have eroded this doctrine (*id.* at 3a-4a) and that "[n]umerous other states have accepted the principle that public policy can limit an employer's power to discharge at-will employees." *Id.* at 4a. Here, the court found that the Texas statutes establishing pension rights for public employees demonstrate "that the state has an interest in protecting employees' interests in pension plans." The court also noted that ERISA Section 510 precludes the discharge of an employee for the purpose of interfering with his pension rights, and added that "[t]he very passage of ERISA demonstrates the

great significance attached to income security for retirement purposes." *Id.* at 5a.

The court accordingly held that "public policy favors the protection of integrity in pension plans and requires in this case an exception to the employment-at-will doctrine. This exception allows recovery when the plaintiff proves that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund." Pet. App. 5a (footnote omitted). The court added that ERISA did not preempt respondent's action "because here the plaintiff acknowledged in his brief to the court of appeals that he is *not* seeking lost *pension benefits* but is instead seeking future wages, mental anguish and punitive damages as a result of the wrongful discharge." *Id.* at 5a n.3. The court accordingly remanded the case to the trial court. *Id.* at 5a.

Justice Cook, joined by two other Justices, dissented. Pet. App. 5a-13a. He maintained "that the law created today by this court relates to a pension plan and directly conflicts with the specific provisions of [ERISA] § 510 establishing a federal cause of action under ERISA. Consequently, that section preempts our new law through § 514(a)." Pet. App. 7a. Justice Cook added that, "because preemption of the claim at issue leaves a plaintiff with a cause of action that can be litigated only in federal court, ERISA preempts the forum as well as the cause of action." *Ibid.* Justice Cook also argued that petitioner was entitled to summary judgment and that the majority should have limited the damages available to respondent (*id.* at 9a-13a). Justice Gonzalez dissented separately (*id.* at 13a-16a), agreeing that respondent's action is preempted by ERISA (*id.* at 13a) and noting that the court left open the question whether respondent would be entitled to punitive damages should he be successful on the merits of his claim. *Id.* at 14a-15a.

SUMMARY OF ARGUMENT

1. The controlling question here is whether the Texas common law rule announced in this case "relate[s] to" an ERISA plan within the meaning of Section 514. In our view, the language of ERISA, which makes preemption turn on a state law's relationship to a plan, cannot encompass laws—like the one formulated by the court below—that apply to an employer rather than to a plan, that regulate the employer's relationship with an employee rather than with a plan, and that have no discernible impact whatever on a plan. In fact, it seems clear to us that ERISA's preemption clause reaches only those state laws that regulate the terms and conditions of ERISA plans, or that refer in terms to those plans.

This understanding of Section 514(a) is conclusively confirmed by an element of ERISA that petitioner ignores, but that should be crucial to the resolution of this case: the statutory definitions that control the interpretation of the preemption section. Section 514(c) defines the universe of potentially preempted enactments to include the laws "of any State," and in turn provides that the term "State" describes any governmental entity that "purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." This definition was written specifically to delimit the scope of the preemption clause; it was drafted at the same time and by the same Conference Committee that placed the "relate to" language in ERISA. Indeed, the portion of the definition of "State" quoted above would be wholly meaningless if it did not set the outer bounds of the preemption clause. By its plain terms, then, the language of ERISA makes preemption appropriate only if the state law, however indirectly, "regulate[s] the "terms and conditions of employee benefit plans." We note that the Court's decisions all have been consistent with this definition of Section 514(a).

The state law at issue here plainly escapes preemption under this test. It regulates the relationship between the

employer and its employee, rather than the ERISA plan. It has no effect whatever on the terms and conditions of the plan, the benefits offered by the plan, the methods by which the plan processes or pays claims, the funding of the plan, or other aspects of plan administration. And while some sort of pension system (although not necessarily an ERISA plan) presumably must be in place for the employee to have a cause of action, that hardly makes the law an attempt to regulate the terms and conditions of an ERISA plan.

2. Petitioner contends that Texas law must "relate to" a plan within the meaning of Section 514(a) because it bears some similarity to ERISA Section 510. But the test set out in Section 514(a) requires relation to a plan, not relation to some other provision of ERISA. Indeed, before adopting the current language of Section 514(a), Congress considered and rejected a preemption test that looked to the overlap between state and federal law—the very test that petitioner contends for now. Petitioner's related argument that the Texas law somehow makes reference to an ERISA plan is equally meritless. The Texas Supreme Court's decision sets out a rule that is directed at any attempt to prevent the vesting of any benefit, whether or not an ERISA plan is involved. Texas law therefore makes no express reference to ERISA, and does not "single[] out ERISA plans, by express reference, for special treatment." *Mackey v. Lanier Collection Agency*, 486 U.S. 825, 838 n.12 (1988).

3. Our reading of Section 514(a) draws additional support from ERISA's legislative history and policies. Each of the principal sponsors described the provision as preempting the state regulation of plans; the examples they provided of laws that would be superseded all involved attempts to regulate plan terms or administration. The legislative history also makes quite clear, as the Court has noted, that the overriding purpose of Section 514(a) was to ensure that the administrative practices of multistate benefit plans would be governed by only a

single set of regulations. But the Texas law at issue here has absolutely no effect on plan administration or policies.

In arguing to the contrary, petitioner and its *amici* maintain that the availability of punitive damages in state court might discourage employers from creating or maintaining plans. But even if petitioner is correct in its assertions that punitive damages are unavailable under ERISA (a question this Court has left open) and that they *are* available under Texas law (a question the court below did not resolve), it remains the case that the state law at issue here does not in any sense regulate the terms and conditions of plans, or raise the threat of disuniformity. And any effect that the decision below might have on employer behavior surely is too tangential and speculative to warrant preemption; after all, this Court already has rejected the proposition that ERISA preempts every state tort or contract law that makes the operation of a plan more expensive.

ARGUMENT

ERISA DOES NOT PREEMPT THE STATE LAW AT ISSUE IN THIS CASE.

Petitioner's argument (Br. 19-21) is grounded largely on general assertions about the breadth and clarity of the ERISA preemption provisions. But these are painfully slender props on which to support petitioner's central contention. In fact, in the ERISA setting this Court repeatedly has "presume[d] that Congress did *not* intend to pre-empt areas of traditional state regulation." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 740 (1985) (emphasis added). See *Massachusetts v. Morash*, 109 S.Ct. 1668, 1675 (1989); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987). See generally, *e.g.*, *English v. General Electric Co.*, 110 S.Ct. 2270, 2278, 2280 (1990); *California v. ARC America Corp.*, 109 S.Ct. 1661, 1665 (1989). This case—which

involves an application of state tort law[2]—thus squarely presents a form of state regulation that presumptively is " 'preserved in our federalist system.' " *Morash*, 109 S.Ct. at 1675, quoting *Fort Halifax*, 482 U.S. at 19.

At the same time, the meaning of Section 514 is hardly crystalline. To the contrary, the Court repeatedly (and rather charitably) has noted that ERISA's preemption provisions "perhaps are not a model of legislative drafting." *Metropolitan Life*, 471 U.S. at 739. See *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 46 (1987); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523-524 (1981). But whatever the provision's outer boundaries, it is clear that Section 514 is not as broad as petitioner seems to suggest: state laws are not preempted simply because they deal generally with the subject of employee benefits (see, *e.g.*, *Fort Halifax*, 482 U.S. at 19; *Morash*, 109 S.Ct. at 1674-1675), and Section 514(a) does not even supersede all state laws that apply *directly* to ERISA plans. See *Mackey v. Lanier Collection Agency*, 486 U.S. 825, 840-841 (1988).

Indeed, the most notable element of petitioner's analysis is its failure to offer a workable test to determine just when it is that a state law "relate[s] to any employee benefit plan" within the meaning of ERISA. And the omission is telling. In fact, a state law is preempted under that language only if it regulates the terms or conditions of ERISA plans, or otherwise is applied to affect the administration or operation of those plans. This test for the application of Section 514(a) follows directly from the statutory language and legislative history, and accords most fully with the policies that underlie ERISA.

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[2] Wrongful discharge suits are hardly novel; as petitioner's *amici* Chamber of Commerce *et al.* recognize, a substantial majority of States now recognize such suits in varying circumstances. See Br. 26-27.

A. A State Law "Relate[s] To" An ERISA Plan Only If It Regulates The Terms, Conditions, Or Administration Of A Plan.

1. As the Court repeatedly has indicated, "[a] law 'relates to' an employee-benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). See *Mackey*, 486 U.S. at 829; *Fort Halifax*, 482 U.S. at 7-8; *Pilot Life*, 481 U.S. at 47; *Metropolitan Life*, 471 U.S. at 739. This definition surely reaches laws that refer in terms to ERISA plans, or that regulate the terms and administration of those plans. But it is difficult to see how statutory language that requires a relationship to "any employee benefit plan" can encompass state laws—like the one at issue in this case—that apply to an employer rather than to a plan, that regulate the employer's relationship with an employee rather than with a plan, and that have no discernible impact whatever on an ERISA plan.[3]

This understanding of Section 514(a) is conclusively confirmed by an element of ERISA that petitioner wholly ignores, but that should be crucial to the resolution of this case: the express definitional provision that Congress placed in Section 514(c) to control the interpretation of "th[e] [preemption] section." 29 U.S.C. § 1144(c). This provision does not define the term "relate to." But it does define the universe of potentially preempted

[3] Of course, if a plaintiff prevailed in a suit such as this one he might be reinstated in his job and, as a consequence, again become a participant in his employer's plan. That is hardly certain, however; respondent himself seeks neither reinstatement nor plan benefits (see Pet. App. 5a n.3), and the Texas Supreme Court said nothing about the scope of available remedies for wrongful discharge. See generally Pet. App. 5a. But in any event, reinstatement generally is available as a remedy under analogous state anti-discrimination laws. That plaintiffs who successfully invoke those laws might become pension plan participants hardly is a basis for preemption under ERISA.

enactments to include the laws "of any State" (Section 514(c)(1)), and in turn provides that the term "State" describes any governmental entity that "purports *to regulate*, directly or indirectly, *the terms and conditions of employee benefit plans* covered by this subchapter." Section 514(c)(2) (emphasis added).

This definition was written specifically to control the interpretation of the "relate to" clause. As originally passed by the respective Chambers of Congress, neither the House nor the Senate versions of the bills that became ERISA contained a definitional section. See H.R. 2, 93d Cong., 2d Sess. § 699(a), reprinted at 3 Staff of Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974* 3599, 3820 (Comm. Print 1976) [hereinafter *Leg. Hist.*] (Senate version); H.R. 2, 93d Cong., 2d Sess. § 514, reprinted at 3 *Leg. Hist.* 3898, 4057-4059 (House version). Instead, that section was drafted by the Conference Committee along with the "relate to" language. See H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 83 (1974), reprinted at 3 *Leg. Hist.* 4277, 4357-4358. Its purpose therefore could only have been to delimit the scope of the preemption clause. Indeed, the portion of Section 514(c) quoted above would be wholly meaningless if it did not set the outer bounds of the statute's preemptive effect. And needless to say, Section 514(a) cannot be divorced from the provision that defines its terms; "the term 'State' either informs the meaning of 'relate to' or imposes independent requirements of its own." Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 Tex. L. Rev. 1313, 1325 (1984). In either event, the express language of ERISA makes preemption appropriate only if the state law, however indirectly (or even inadvertently), "regulate[s]" the "terms and conditions of employee benefit plans."

2. The Court's decisions all have been consistent with this understanding of Section 514(a). The Court has found that state laws "relate[d] to" ERISA plans when those laws affected benefit computation levels (see *Alessi*, 451 U.S. at 507-508, 524), mandated payment of particular benefits or modified the terms of a plan (see *Metropolitan Life*, 471 U.S. at 739; *Shaw*, 463 U.S. at 88-90), provided for "suit[s] by a beneficiary to recover benefits from a covered plan" (*Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 62-63 (1987); see *Pilot Life*, 481 U.S. at 43, 47-48), or otherwise "expressly refer[red] to—indeed, solely applied to—ERISA employee benefit plans." *Mackey*, 486 U.S. at 829. All of these, of course, are cases in which the state law effectively regulated the substance of plan benefit or payment policies.[4] On the other hand, state laws that did not affect the operation of plans have escaped preemption even when they regulated employee benefits. See *Fort Halifax*, 482 U.S. at 22-23. See also *Mackey*, 486 U.S. at 833-834. Indeed, this distinction explains why "run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts" (*Mackey*, 486 U.S. at 833) may be applied *directly* to plans; although such laws may have a very substantial effect on plans, they do not regulate plan terms, benefits, or administration—and therefore do not "relate to" plans.

It should be added that this is not a novel approach to preemption. The Court has held, for example, that Congress preempted the field of nuclear safety regulation, just as it has preempted the field of ERISA plan regulation. See, *e.g.*, *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 205 (1983). Just last Term, however, in a case that bears a remarkable similarity to this one, the Court unanimously rejected the contention that federal law preempted a state tort claim brought by an employee at a nuclear facility who asserted that she had been terminated for complaining about safety violations. The Court explained that

> not every state law that in some remote way may affect the nuclear safety decisions made by those who build and own nuclear facilities can be said to fall within the pre-empted field. We have no doubt, for instance, that the application of state minimum wage and child labor laws to employees at nuclear facilities would not be pre-empted, even though these laws could be said to affect tangentially some of the resource allocation decisions that might have a bearing on radiological safety.

English v. General Electric Co., 110 S. Ct. at 2278. "Instead," the Court added, "for a state law to fall within the pre-empted zone, it must have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *Ibid.*[5] Preemption in the nuclear

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[4] When—as in *Mackey*, which in part concerned special state garnishment rules that applied only to ERISA plans (see 486 U.S. at 828-829)—"a state law on its face imposes obligations on employee benefit plans, the law clearly 'relates to' the plan, because it invariably announces a purpose to regulate the manner in which plans operate within the law-creating state." Kilberg & Inman, *supra*, 62 Tex. L. Rev. at 1331 (footnote omitted).

[5] Petitioner's *amici* Chamber of Commerce *et al.* suggest that this case is distinguishable from *English* because ERISA, unlike the enactments at issue in *English*, contains an express preemption provision. Br. 8 n.10, 20 n.20. But the point of Section 514, as ERISA's principal sponsors made quite clear, was simply "to preempt the field for Federal regulations." 120 Cong. Rec. 29,933 (1974) (remarks of Sen. Williams), reprinted at 3 *Leg. Hist.* 4745. See *id.* at 29,197 (remarks of Rep. Dent) ("preemption of the field"), reprinted at 3 *Leg. Hist.* 4670; *id.* at 29,942 (remarks of Sen. Javits) ("the displacement of State action in the field of private employee benefit programs"), reprinted at 3 *Leg. Hist.* 4771. It should make no difference to the analysis that Congress preempted the field explicitly rather than by implication. As a result, *English*'s application of preemption of the field principles is relevant here.

field accordingly is appropriate only when the state law regulates some aspect of nuclear safety—just as preemption under ERISA is appropriate only when the state law regulates some aspect of plan benefits or administration.

The state law at issue here plainly escapes preemption under this test. It regulates the relationship between the employer and its employee, rather than the ERISA plan.[6] It has no effect whatever on the terms and conditions of the plan, the benefits offered by the plan, the methods by which the plan processes or pays claims, the funding of the plan, or other aspects of plan administration. Indeed, the Texas law's only arguable connection to petitioner's plan arises from the requirement that some sort of pension system (although not necessarily, as we explain below, an ERISA plan) presumably must be in place for the employee to have a cause of action. But that hardly makes the law an attempt to "regulate" the "terms and conditions" of a plan, or gives the law any effect on the operation of a plan. If this attenuated association may be said to affect the plan at all, it plainly does so "in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n.21.[7]

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[6] We do not suggest, of course, that state laws necessarily do not "relate to" plans simply because they are directed at employers. A law requiring that employers make specified contributions to a plan, for example—or, for that matter, requiring that employers create plans offering certain benefits—plainly would fall within the scope of the preemption clause. So would state laws mimicking many of the provisions of ERISA cited by petitioner (Br. 43) and its *amici* (Br. Chamber of Commerce *et al.* 21-23). But they would do so because they would regulate, albeit indirectly, the operation or administration of plans. The Texas law at issue here has no such effect.

[7] Petitioner is incorrect in asserting that "[federal and state] courts have *uniformly* found that state non-interference laws like that of the State of Texas 'relate to' ERISA-covered plans and are

3. Petitioner's principal attempt to demonstrate that the Texas law "relate[s] to" a plan turns on Section 510, which prohibits the discharge of a plan participant "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. § 1140. As we understand it, petitioner means to suggest that a state law "relate[s] to" a plan if the law resembles any substantive provision of ERISA. Br. 21-24. But Section 514(a) requires relation to a plan, not relation to some other provision of ERISA. And there is no reason to suppose that a state law "relate[s] to" a plan within the specific (and as we explain above, specifically defined) meaning of the preemption clause simply because that law parallels, in part, a different provision of ERISA that was enacted for dramatically differing purposes. To the contrary, as petitioner itself surely recognizes (see Br. 29-32), Congress considered and rejected a preemption test that looked to

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preempted." Br. 44 (emphasis in original). The Texas Supreme Court itself cited two federal decisions that recognized causes of action identical to the one in this case (Pet. App. 4a-5a); one of these decisions explicitly concluded that "New York law cannot be contrary to ERISA," *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822, 826 (E.D.N.Y. 1980), and the second relied on the analysis of *Savodnik*. *Hovey v. Lutheran Medical Center*, 516 F. Supp. 554, 558 (E.D.N.Y. 1981). See also *K Mart Corp. v. Ponsock*, 732 P.2d 1364, 1372 (Nev. 1987) (recognizing action for dismissal to avoid payment of retirement benefits without discussing ERISA). In addition, it is not at all clear that one of the decisions relied upon by petitioner actually holds that actions such as this one are preempted. In *Conway v. Eastern Associated Coal Corp.*, 358 S.E.2d 423, 427 (W.Va. 1986) (footnote omitted), the court did indicate that "[t]his area is preempted by Federal ERISA law * * * * and such [wrongful discharge] is illegal under 29 U.S.C. § 1140." It appears, however, that the court believed ERISA *supported* the plaintiff's contention that his discharge violated public policy. The court accordingly went on to note that the action was not time-barred (see 358 S.E.2d at 427 n.1) but added that the plaintiff "presented no evidence whatsoever to support this allegation [of wrongful discharge]. * * * Therefore, we hold that the trial court correctly dismissed this cause of action." *Ibid.*

the overlap between state and federal law—the very test that petitioner contends for now.

Going into conference, the Senate bill that became ERISA would have preempted state laws "insofar as they may now or hereafter relate to the *subject matters regulated by this Act*." H.R. 2, § 699(a), 93d Cong., 2d Sess. (Mar. 4, 1974) (emphasis added), reprinted at 3 *Leg. Hist.* 3599, 3820. By replacing that language with the current statutory formula, Congress adopted a system that preempted "state laws relating to *plans* covered by ERISA as opposed to *subjects* covered by the Act." Kilberg & Heron, *The Preemption of State Law Under ERISA*, 1979 Duke L.J. 383, 390 (emphasis in original). Of course, in some important ways the change broadened ERISA's preemptive effect; that may be seen in several of the ERISA cases already decided by the Court.[8] But in other circumstances, as here, the change effectively narrowed the scope of preemption. "[T]he words actually chosen by Congress to effectuate its will" (*Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 372 (1986)) thus do not reach the Texas law challenged by petitioner, and that should be the end of the matter. See *Fort Halifax*, 482 U.S. at 9-12.

Petitioner also insists that Texas common law must be preempted because it makes "'reference to'" an ERISA plan. Br. 20, quoting *Shaw*, 463 U.S. at 97. This is simply incorrect. On its face, the Texas Supreme Court's decision sets out a rule that is directed at any attempt to prevent the vesting of any retirement benefit, whether

[8] *Shaw*, for example, involved state laws that mandated the payment of certain disability benefits and precluded plans from discriminating on the basis of pregnancy. See 463 U.S. at 88-90. These laws were preempted because they regulated—and therefore plainly "relate[d] to"—plans, even though ERISA itself "does not regulate the substantive content of welfare-benefit plans." *Metropolitan Life*, 471 U.S. at 732. See *Shaw*, 463 U.S. at 91.

or not an ERISA plan is involved. See Pet. App. 5a.[9] Yet as the Court explained in *Mackey*, a state law makes "reference to" a plan within the meaning of *Shaw* only when the law contains an "express reference to ERISA" (486 U.S. at 830); the Court noted "the disparate treatment accorded to non-ERISA benefit plans" by the state law at issue in *Mackey* (*id.* at 830 n.4), and held that "*any* state law which singles out ERISA plans, by express reference, for special treatment is pre-empted. * * * It is this 'singling out' that pre-empts the [state law at issue]." *Id.* at 838 n.12 (emphasis in original).

The state law here, however, does not single out ERISA plans. And it should no more be preempted because it involves the general area of retirement benefits than was the law in *Fort Halifax* preempted because it involved the general area of severance benefits. See *Fort Halifax*, 482 U.S. at 12. Indeed, the Texas law plainly is valid as applied to non-ERISA plans: under *Mackey* the law might be vulnerable to attack under ERISA if it in terms singled out employers who operated ERISA plans for especially favorable treatment by protecting them from suit.

Petitioner similarly complains (Br. 20 n.4) that a state court might look to a plan's provisions to determine whether evasion of pension obligations could have been the reason for dismissal of an employee. Under the Texas rule, however, state courts do not award plan benefits or otherwise apply the plan; as the Texas Supreme Court noted, the plan document is relevant only insofar as it may help "to explain the motivation behind [the employer's] initial termination of [the employee]." Pet. App. 2a-3a n.2. This use of the plan as evidence hardly justifies preemption: "interpretation alone does not con-

[9] Indeed, the court specifically pointed to state statutes that create pension plans for public employees who are not covered by ERISA. Pet. App. 5a.

stitute regulation of the terms and conditions of a plan." Kilberg & Inman, *supra*, 62 Tex. L. Rev. at 1330.

B. The Legislative History And Policies Of ERISA Cut Against Preemption.

1. Our understanding of Section 514(a) draws additional support from ERISA's legislative history and policy. The evolution of ERISA's preemption provisions has, perhaps unfortunately, become familiar. See *Metropolitan Life*, 471 U.S. at 745-746; *Shaw*, 463 U.S. at 98-99. As we explain above, for present purposes the most notable element in the development of the existing statutory language was the abandonment of a test that focused on areas covered by ERISA and the substitution of one that makes dispositive a state law's regulatory impact on plans. And the significance of this change is made clear by the floor debate, which offers the only useful discussion of Section 514(a)'s meaning.[10]

Each of ERISA's principal sponsors described Section 514 as setting aside "non-Federal *regulation of employee benefit plans*." 120 Cong. Rec. 29,197 (1974) (remarks of Rep. Dent) (emphasis added), reprinted at 3 *Leg. Hist.* 4670. See *id.* at 29,933 (remarks of Sen. Williams), reprinted at 3 *Leg. Hist.* 4745-4746; *id.* at 29,942 (remarks of Sen. Javits), reprinted at 3 *Leg. Hist.* 4770-4771. The examples offered during the debate of state laws that would be superseded—professional regulation of the contents of legal services programs (see *id.* at 29,949 (remarks of Sen. Javits), reprinted at 3 *Leg. Hist.* 4789; *id.* at 29,933 (remarks of Sen. Williams), reprinted at 3 *Leg. Hist.* 4746), compelled disclosure on the part of plans (see *id.* at 29,942 (remarks of Sen. Javits), reprinted at 3 *Leg. Hist.* 4771), imposition of fiduciary

[10] As we note above, the current language of Section 514(a) was written in conference. For its part, the Conference Report simply echoes the statutory language. See H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 383 (1974), reprinted at 3 *Leg. Hist.* 4277, 4650.

requirements on plans (see *ibid.* (remarks of Sen. Javits), reprinted at 3 *Leg. Hist.* 4771), and the like[11]—thus all involved attempts to regulate the administration of or benefits offered by plans. While this list is not exhaustive, it certainly is suggestive of the sorts of state laws that were thought to "relate to" ERISA plans.

Indeed, the one general indication of the manner in which Congress intended the preemption provisions to apply supports our reading. Representative Dent, floor manager for the bill in the House, explained that ERISA's preemption provisions "followed to a large extent the same approach as in Public Law 93-222 * * * where the regulation of health maintenance organizations [HMOs] was foreclosed to state authority—section 113(a) [sic]."[12] 120 Cong. Rec. 29,197 (1974), reprinted at 3 *Leg. Hist.* 4670. The statute to which Representative Dent referred preempted state laws relating to the creation and organization of HMOs—just as Section 514 of ERISA preempts laws that regulate the terms and conditions of plans. But nothing in that statute reached peripheral state rules of the sort at issue here.[13]

[11] Senator Javits offered the fullest description of Section 514's impact, stating that, "[i]n view of Federal preemption, State laws compelling disclosure from private welfare or pension plans, imposing fiduciary requirements on such plans, imposing criminal penalties on failure to contribute to plans—unless a criminal statute of general application—establishing state termination insurance programs, et cetera, will be superseded." 120 Cong. Rec. 29,942 (1974), reprinted at 3 *Leg. Hist.* 4771.

[12] Congressman Dent in fact had in mind Section 1311(a).

[13] The statute thus preempted laws requiring medical society approval for the creation of HMOs, requiring that physicians constitute a defined percentage of an HMO's governing body, requiring that all or a percentage of physicians in the locale be permitted to participate in providing services for the HMO, or requiring that HMOs meet specified capitalization or other financial requirements. 87 Stat. 931.

2. The legislative history also makes clear why Congress made preemption turn on a finding that state law regulates plan terms or administration: the fundamental purpose of the preemption provision was elimination of "the threat of conflicting or inconsistent State and local regulation of employee benefit plans." 120 Cong. Rec. 29,933 (1974) (remarks of Sen. Williams), reprinted at 3 *Leg. Hist.* 4745-4746. See *id.* at 29,197 (remarks of Rep. Dent) ("eliminating the threat of conflicting and inconsistent State and local regulation"), reprinted at 3 *Leg. Hist.* 4670. Congress thus intended to sweep aside "multiple and potentially conflicting State laws" so as to ensure "unformity with respect to interstate plans." *Id.* at 29,942 (remarks of Sen. Javits), reprinted at 3 *Leg. Hist.* 4770-4771.

The Court accordingly has recognized that "[t]he focus of the statute thus is on the administrative integrity of benefit plans." *Fort Halifax*, 482 U.S. at 15. In its most comprehensive analysis of the preemption provision's purposes, the Court explained that the legislative history

> reflect[s] recognition of the administrative reality of employee benefit plans. An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements. The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States. A plan would be required to keep certain records in some States but not in others; to make certain benefits available in some States but not in others; to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others.

Fort Halifax, 482 U.S. at 9. The Court therefore found it "clear that ERISA's pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. * * * Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations." *Id.* at 11.[14]

Although petitioner (Br. 36-41) and its *amici* (Br. Chamber of Commerce *et al.* 26-28) struggle gamely to demonstrate that Texas law will have an adverse effect on plans, they do not—and plainly could not—suggest that "state law create[s] the prospect that an employer's administrative scheme would be subject to conflicting requirements" (*Fort Halifax*, 482 U.S. at 10); "[t]he Company makes no contention that its [state] statutory duty has in any way hindered its ability to operate its retirement plans in uniform fashion." *Id.* at 14. And that should dispose of petitioner's case, for Texas law accordingly "present[s] none of the risks that ERISA is intended to address." *Morash*, 109 S.Ct. at 1673.

It should be added that, even on their own terms, the assertions of petitioner and its *amici* about the adverse impact of the Texas law are substantially overstated. Petitioner seems especially concerned about the possi-

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[14] This understanding explains why ERISA preempts state laws that regulate plans even when those laws are consistent with the federal statute's underlying purpose. See *Metropolitan Life*, 471 U.S. at 739; *Mackey*, 486 U.S. at 829. Laws that exceed ERISA's minima would subject multistate plans to varying requirements in different States. It should be noted, however, that the prospect of increased administrative or litigation costs cannot justify preemption where it is not required by the plain terms of Section 514(a). See *Mackey*, 486 U.S. at 831-832; compare *id.* at 843-844 (Kennedy, J., dissenting). Cf. *Firestone*, 109 S.Ct. at 956.

bility of punitive damages awards against employers. Asserting that such damages are unavailable in actions brought under Section 502(a)(3) to enforce Section 510 of ERISA, petitioner (Br. 39) and its *amici* (Br. Chamber of Commerce *et al.* 26-27) complain that the prospect of punitive damages liability in state tort actions will discourage employers from creating plans. We note that this complaint is premature; the Texas Supreme Court held only that respondent had asserted a proper cause of action, and left open the scope of the remedies available to respondent if he ultimately prevails on the merits of his claim. See Pet. App. 5a.[15] Moreover, the premise of petitioner's argument—that punitive damages are unavailable in federal court—may well be mistaken: this Court has left open the question whether such damages may be awarded under Section 502(a)(3), see *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 139 n.5, 144 n.12 (1985), and there are compelling reasons to believe that punitive damages should be available under the provision.[16]

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[15] Justice Gonzalez noted in dissent that "[t]he court * * * does not resolve whether the plaintiff is entitled to all damages pleaded," adding that "[t]his is essentially an open question." Pet. App. 14a. Justice Gonzalez also explained that, in Texas, "[a]s a general rule, the damages available for common law wrongful termination are contractual in nature." *Id.* at 15a.

[16] Both Congress and the Court have made it clear that "courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'" *Firestone*, 109 S.Ct. at 954, quoting *Pilot Life*, 481 U.S. at 56. See also, *e.g.*, *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983); 120 Cong. Rec. 29,942 (1974) (remarks of Sen. Javits), reprinted at 3 *Leg. Hist.* 4770-4771. In doing so, "'state law where compatible with national policy may be resorted to and adopted as a national rule of decision. . . . Here, of course, there is little federal law to which the court may turn for guidance. State regulation of insurance, pensions, and other such programs, however, provides a pre-existing source of experience and experiment in an area in which there is, as yet, only federal inexperience. * * * [S]tate statutory sources of law will no doubt play a major role in the development of a federal common law under ERISA.'" *Massachusetts Mutual*, 473 U.S. at 157-158 n.18 (Brennan, J., concurring in the judgment) (citation omitted). Cf. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979); *United States v. Yazell*, 382 U.S. 341, 356-357 (1966). And as petitioner's *amici* recognize (see Br. Chamber of Commerce *et al.* 26-27), this background of state tort law—to which federal courts should refer in defining the scope of the action for violation of ERISA Section 510—typically makes punitive damages available in circumstances such as those in this case.

In any event, even if punitive damages are available in state but not in federal court, it hardly seems likely that the prospect of additional liability for wrongful discharges that *already* are illegal and actionable under federal law will have much of an impact on the formulation and maintenance of plans. Whatever effect Texas law has by "attach[ing] additional consequenecs to retaliatory conduct by employers" surely "is neither direct nor substantial enough to place petitioner's claim in the preempted field." *English*, 110 S. Ct. at 2278. After all, as this Court already has made clear, it cannot be the case that a state law—such as a run-of-the-mill state tort or contract law—is preempted simply because it makes it more expensive for employers to operate plans. See *Mackey*, 486 U.S. at 831-832. The same plainly is true of petitioner's complaint (Br. 37) that, apart from questions of remedy, varying procedural devices will be applied in state wrongful discharge actions; the suggestion that employers will terminate plans to avoid state jury trials in cases that already may be remedied in federal court is simply incredible.[17] And most important, in neither case

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[17] Petitioner also argues (Br. 37-38) that the scope of the action defined by the Texas Supreme Court permitting recovery "when the plaintiff proves that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits" (Pet. App. 5a)—differs from the substantive scope of Section 510. We find it hard to believe that petitioner seriously advances this contention; if it does, its lengthy exegesis of Section 510 (see Br. 23-24, 26-36), which is premised on "the obvious comparability between ERISA Section 510 and the Texas law" (Br.

does the state cause of action in any sense regulate the terms and conditions of ERISA plans.

Of course, a state law that does not "relate to" a plan might nonetheless be preempted if it actually conflicts with a substantive provision of ERISA. Cf. *Fort Halifax*, 482 U.S. at 19. But that plainly is not the case here: as the Court noted in a related setting, "[p]aying both federal fines and state-imposed punitive damages * * * would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257 (1984). That understanding is true of ERISA as well, a statute that was, after all, "enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans.'" *Firestone*, 109 S.Ct. at 955, quoting *Shaw*, 463 U.S. at 90.

C. ERISA's Enforcement Provision Does Not Preempt Texas Common Law.

Finally, petitioner (Br. 25-26) and its *amici* (Br. Chamber of Commerce *et al.* 16-17) seem to suggest that ERISA's enforcement provision, Section 510, may of its

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24 n.7), would be irrelevant. Indeed, the question presented by petitioner is whether ERISA preempts state laws that permit an employee to challenge a discharge designed to "interfere with his attainment of benefits under an ERISA-covered pension benefit plan." Br. i. And the Texas Supreme Court's language does not, in fact, seem notably different from that used by federal courts in describing the cause of action under Section 510. See, *e.g.*, *Ursic v. Bethlehem Mines*, 556 F. Supp. 571, 574 (W.D. Pa.) (condemning "strategy of reducing pension payments from the corporate treasury"), aff'd in relevant part, 719 F.2d 670, 672 (3d Cir. 1983). In any event, if Texas law does not "relate to" a plan it need not precisely parallel federal law to escape preemption. Cf. *English*, 110 S. Ct. at 2278. Of course, if state law actually conflicts with a provision of ERISA (see Pet. Br. 38), or prohibits conduct that is permitted by ERISA, it will be preempted for that reason. See generally *Fort Halifax*, 482 U.S. at 19; *Alessi*, 451 U.S. at 524-525.

own force preempt Texas common law. This contention is without merit. Where an enforcement provision appears in the same statutory subchapter as an express preemption provision, the latter provision surely defines the scope of preemption.[18] In any event, "[o]rdinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law." *ARC America Corp.*, 109 S.Ct. at 1667. See, *e.g.*, *English*, 110 S.Ct. at 2280.[19] Indeed, "[o]rdinarily, the mere existence of a federal regulatory or enforcement scheme, even one [that is] detailed * * * does not by itself imply pre-emption of state remedies." *Id.* at 2279.

In *English*, the Court accordingly rejected the contention—identical to the one made by petitioner here—that the omission of a punitive damages remedy from a comprehensive federal remedial scheme (which provided for reinstatement, back pay, compensatory damages, and attorney's fees) should be understood to preempt a state cause of action for punitive damages. *Id.* at 2273 n.2, 2279-2280 (interpreting Section 210 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851(a). There is no reason for a different outcome under ERISA.

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[18] Petitioner (Br. 34, 36) and *amici* Chamber of Commerce *et al.* (Br. 13-14) seize upon Senator Williams' statement that "the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulation." 120 Cong. Rec. 29,933 (1974), reprinted at 3 *Leg. Hist.* 4745-4746. But the substantive and enforcement provisions have this effect through operation of Section 514(a); otherwise, the preemption clause would be meaningless. Again, then, the crucial question here is the scope of the "relate to" clause.

[19] That is true even when the federal courts have exclusive jurisdiction to entertain claims under the federal cause of action, as is the case, to give just one example, in actions under the Sherman and Clayton Acts, the provisions of federal law that were asserted to have preemptive force in *ARC America*. See 15 U.S.C. §§ 4, 15(a).

It should be added that the reliance of petitioner (Br. 25) and its *amici* (Br. Chamber of Commerce *et al.* 14-15) on *Pilot Life* is misplaced.[20] The Court did not there suggest that ERISA's enforcement provisions themselves have preemptive force; it was conceded that the state law at issue "relate[d] to" an ERISA plan, and the question before the Court was whether a state-law action challenging the plan's payment methods "fall under an exception to § 514(a)," the so-called saving clause.[21] *Pilot Life*, 481 U.S. at 47-48. And while the Court did look to the enforcement provisions to help inform its understanding of the saving clause (see *id.* at 52), the Court found it dispositive that the case involved the claims settlement process, explaining that the enforcement provisions reflect a "balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Id.* at 54. This is wholly consistent with our understanding that the preemption of actions challenging plan payment terms was a central purpose of the preemption clause.

Indeed, the decision in *Pilot Life* primarily turned on the nature of the claim as one seeking benefits from a plan. The Court's holding substantially relied on Con-

[20] *Amici* Chamber of Commerce *et al.* also rely (Br. 19-20) on *Wisconsin Dep't of Industry v. Gould Inc.*, 475 U.S. 282 (1986), and other cases involving the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, to support their argument that the state courts are ousted of jurisdiction here. But those decisions are inapposite; they turned on the primary jurisdiction of the National Labor Relations Board under that statute and the importance "to the administration of the Act that these determinations be left in the first instance to the [NLRB]." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-245 (1959). See *id.* at 242; *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971); *Garner v. Teamsters Union*, 346 U.S. 485, 490-491 (1953).

[21] This clause, Section 514(b)(2)(A), saves from preemption under Section 514(a) "any law of any State which regulates insurance, banking, or securities." See generally *Metropolitan Life*, 471 U.S. at 739-747.

gress's decision to model the Section 502(a) cause of action against plans and their fiduciaries on Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. The Court noted that,

> "[U]nder the conference agreement, civil actions may be brought by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and for relief from breach of fiduciary responsibility. . . . [W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. *All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.*"

Pilot Life, 481 U.S. at 55, quoting H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327 (1974) (emphasis added by the Court). Plainly, the *"all such actions"* are those brought to recover plan benefits. The Court thus explained that "Congress' specific reference to § 301 of the LMRA to describe the civil enforcement scheme of ERISA makes clear its intention that all such suits *brought by beneficiaries or participants asserting improper processing of claims* under ERISA-regulated plans be treated as federal questions governed by § 502(a)." *Pilot Life*, 481 U.S. at 56 (emphasis added). Respondent's suit, in contrast, which was not brought against a plan, and does not relate either to benefits[22] or to the other terms and conditions of a plan, is not affected by the *Pilot Life* analysis.

[22] Although petitioner notes (Br. 42) that respondent at one point sought relief for loss of various benefits, that is not part of the cause of action approved by the Texas Supreme Court. The court noted that petitioner had allowed respondent's pension to vest, and explained that "the pension plan issue is relevant in order to explain the motivation behind [petitioner's] initial termination of

CONCLUSION

The judgment of the Texas Supreme Court should be affirmed.

Respectfully submitted,

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respondent." Pet. App. 3a n.2. Indeed, the Texas Supreme Court held that petitioner's action is not preempted precisely because "the plaintiff acknowledged in his brief to the court of appeals that he is *not* seeking lost *pension benefits* but is instead seeking future wages, mental anguish and punitive damages as a result of the wrongful discharge." *Id.* at 5a n.3 (emphasis in original).